

THE AMERICAN NATIONAL RED CROSS, GREAT
LAKES BLOOD SERVICES REGION and MID-
MICHIGAN CHAPTER,

Respondent ANRC – Region
Respondent ANRC – Chapter,

and

LOCAL 459, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Charging Union OPEIU,

and

LOCAL 580, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Charging Union Teamsters.

Cases 7-CA-52033
7-CA-52288
7-CA-52544
7-CA-52811
7-CA-53018

Cases 7-CA-52282
7-CA-52308
7-CA-52487

RESPONDENTS' BRIEF IN SUPPORT OF RESPONDENTS' MOTION FOR
RECONSIDERATION AND ACCEPTANCE
OF RESPONDENTS' REPLY BRIEF

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PROCEDURAL BACKGROUND

On May 5, 2011, Administrative Law Judge Jeffrey D. Wedekind issued a Decision and Order in the above-captioned matter.¹ On May 27, 2011, Counsel for the Acting General Counsel (“General Counsel”) requested and was granted an extension until June 30, 2011 to file exceptions; said motion was not opposed by Charging Union, Local 459, Office and Professional Employees International Union, AFL-CIO (“Charging Union OPEIU”) or Charging Union Local 580, International Brotherhood of Teamsters (“Charging Union Teamsters”). On June 30, 2011, the American National Red Cross, Great Lakes Blood Services Region, and the American National Red Cross, Mid-Michigan Chapter, (hereinafter “Respondents”) filed and served upon Charging Union OPEIU, Charging Union Teamsters and General Counsel exceptions to the Decision and Order, along with a supporting brief. On July 1, 2011, General Counsel, by Dynn Nick, contacted Respondents’ counsel requesting an extension until on or about August 5, 2011, to file answering briefs in order to accommodate the vacation schedule of one of the General Counsel. (Affidavit of Leslie A. Sammon In Support of Respondents’ Motion For Reconsideration And Acceptance Of Respondents’ Reply Brief, hereinafter “Affidavit”). An extension was thereafter requested and granted until August 4, 2011. On August 4, 2011, Respondents were served with answering briefs filed and served by Charging Union OPEIU and General Counsel in response to Respondents’ exceptions and supporting brief. Respondents, by Leslie A. Sammon, e-filed a reply brief to the answering briefs of Charging Union OPEIU and General Counsel, which was received in Washington, D.C. at 12:33:15 AM Eastern Standard Time on August 19, 2011. (Affidavit at ¶ 12). Parties of record, including Charging Union

¹ An Erratum was issued on May 31, 2011 in response to a joint motion for erratum filed by General Counsel and Charging Union OPEIU.

OPEIU, Charging Union Teamsters and General Counsel, were electronically served at 12:42 AM Eastern Standard Time on August 19, 2011. (*Id.*)

Charging Union OPEIU filed a Motion to Strike Respondents' Reply Brief on August 19, 2011, citing the Board's rules for electronic filings using the E-Filing system, specifically, the requirement that documents be received before midnight local time of the receiving office on the due date. On August 22, 2011, Respondents' counsel received correspondence from the Associate Executive Secretary stating that Respondents' reply brief is untimely and will not be considered by the Board. Respondents submit this brief and supporting affidavit with its Motion For Reconsideration and Acceptance of Respondents' Reply Brief.

ARGUMENT

Section 102.111(c) of the Board's Rules and Regulations, as amended, authorizes acceptance of late-filed briefs within a reasonable time after the time prescribed by the rules upon good cause shown based on excusable neglect and when no undue prejudice would result. Section 102.111(c) of the Board's Rules and Regulations. Respondents submit that the circumstances attendant to the filing of Respondents' Reply Brief, ultimately filed only 34 minutes late, do not warrant the harsh penalty of forfeiture and respectfully request that Respondents' Reply Brief be accepted and considered by the Board.

The determination of excusable neglect is an equitable one dependent on the surrounding circumstances. *See International Union of Elevator Constructors*, 337 NLRB 426, 427 (accepting an answering brief received in Washington, D.C. three (3) days late under the excusable neglect provision of Section 102.111(c), referencing the standard applied in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993), which concluded that the determination of "excusable neglect" is an equitable one, taking into

account all the relevant circumstances surrounding the omission, including the danger of prejudice to the non-moving party, the length of the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith). When counsel have made inadvertent errors and promptly and diligently acted to correct them, briefs have been accepted despite being untimely, particularly where there is no prejudice to any party by virtue of late filing. *See, e.g., Barstow Community Hospital*, 352 NLRB 1052, 1059 fn. 4 (2008)(accepting charging party's post hearing brief filed three (3) days late and respondent's brief filed with the Regional Director rather than the Division of Judges based on counsels' explanations of inadvertent errors, their diligent attention to them and the fact that no undue prejudice resulted to any party); *Altercare of Wadsworth Center*, 355 NLRB No. 96, slip op. at 6-7 (August 19, 2010)(noting that recent Board decisions indicate a reluctance to impose the harsh penalty of forfeiture and accepting a post hearing brief improperly filed by respondent by facsimile based on counsel's inadvertent error failing to take note of applicable Board Rules as noted in closing instructions; respondent corrected its error the next business day after learning of its mistake and there was no prejudice to the General Counsel); *Loparex LLC*, 353 NLRB 1224, 1225, fn. 1 (2009)(accepting respondent's brief despite respondent's failure to technically comply with the regulation regarding proper method of service where General Counsel's motion to strike did not identify any prejudice from the improper method of service and no prejudice was apparent); *WGE Federal Credit Union*, 346 NLRB 183 (2005)(declining imposition of the harsh penalty of forfeiture and accepting exceptions and a brief filed in support of exceptions electronically filed 30 and 42 minutes late, respectively, reasoning that the issue is whether the Board should equitably excuse counsel's neglect and noting that counsel missed the deadline by a matter of minutes and no one was prejudiced by the delay); *Landmark Family*

Foods, Inc., 356 NLRB No. 170, slip op. at 1, fn. 2 (May 31, 2011)(denying motion to strike charging party's untimely brief electronically filed 48 seconds after the deadline, noting, among other things, that the charging party did not gain any advantage and respondent did not suffer any prejudice).

In this case, Respondents submit that the balance of the equities weighs in favor of accepting and considering Respondents' Reply Brief. Respondents' counsel acted in good faith with the intention of timely filing Respondents' reply brief but did not do so based on counsel's inadvertent failure to take into account the time zone of the receiving office. The amount of the delay was negligible – measurable as a matter of minutes rather than hours or days – and cannot be said to have prejudiced the Charging Unions or the General Counsel. Further undercutting any alleged prejudice suffered by the Charging Unions or the General Counsel is the fact that the brief in question is a reply brief to which no response is allowed under the rules, except by special leave of the Board.² *See* Section 102.46(h) of the Board's Rules and Regulations. Even if a responsive brief were allowed, Respondents' reply brief does not raise new arguments not previously raised and argued such that any party would suffer prejudice by the Board's acceptance of the brief. *See Total Property Services, Inc.*, 317 NLRB 975, 979, fn. 3 (1995)(accepting briefs that were not mailed until the due date noting that the non-moving party was not prejudiced where the briefs essentially reiterate arguments previously raised so that the non-moving party was not prejudiced).

CONCLUSION

A strict, unyielding application of the technicalities associated with the Board's Rules and Regulations is not warranted in the circumstances of this case where there is good cause

² Charging Party appears to acknowledge the lack of prejudice under the circumstances, failing in its Motion to Strike to allege the delay caused undue prejudice, or for that matter, any prejudice at all.

based on excusable neglect and no undue prejudice. Respondents respectfully request that the Executive Secretary reconsider its decision to exclude Respondents' Reply Brief from consideration by the Board and accept Respondents' Reply Brief for consideration by the Board.

Dated: August 22, 2011.

Respectfully submitted,

AXLEY BRYNELSON, LLP

A handwritten signature in black ink, appearing to read "Michael J. Westcott", is written over a horizontal line.

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